Filed 1/31/02

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TOMMIE JOHNNY NAYLOR, Defendant and Appellant.	B144909, B152779 (Los Angeles County Super. Ct. No. SA038380)

APPEAL from a judgment of the Superior Court of Los Angeles County, Victoria Chavez and Bernard J. Kamins, Judges. Affirmed.

PETITION for writ of error *coram vobis*. Denied.

Marylou Hillberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter and Robert F. Katz, Supervising Deputies Attorney General, for Plaintiff and Respondent.

Tommie Johnny Naylor appeals from the judgment following conviction by jury of battery with serious bodily injury. (Pen. Code, §§ 242, 243, subd. (d).) In a separate proceeding, the trial court found that defendant suffered a prior serious felony conviction. (Pen. Code, §§ 667, subd. (a), 667, subds. (b)–(i), 1170.12.) The court sentenced defendant to 13 years.

Defendant has also filed a petition for writ of error *coram vobis* (B152779), which we consider concurrently with this appeal (B144909).

We affirm the judgment and deny the petition.

BACKGROUND

On the afternoon of February 24, 2000, Javier Ortega was on a gardening job in Santa Monica when defendant approached him, showed him jewelry, and asked Ortega if he would buy it. Ortega declined. Defendant stepped away but returned and made a second request of Ortega to purchase the jewelry. Again, Ortega declined, telling defendant that he had no money. Irritated, defendant said, "'You're a fucking woman. You don't have any money,'" and punched Ortega in the face.

Ortega was transported to a nearby hospital, where he underwent X-ray examinations, received medical treatment to stop the bleeding from his nose, and was given a prescription for pain medication. The hospital records indicated that Ortega suffered a "nasal fracture." Ortega was instructed not to go to work the following day and to return to the hospital. Ortega did not return to the hospital. Instead, he went to a different medical facility. Due to pain and bruising, Ortega could not touch his nose for a week. He still felt pain more than three weeks after the incident. At the time of trial, Ortega said that the area below his left eye and to the left side of his nose "hurt[]" when "touch[ed]."

ISSUES

Defendant contends that the trial court erred in granting his request to represent himself (*Faretta v. California* (1975) 422 U.S. 806) and the evidence was insufficient to prove the serious bodily injury component of his felony battery conviction.

DISCUSSION

1. Defendant's *Faretta* request

"A criminal defendant has a right to represent himself at trial under the Sixth Amendment to the United States Constitution. [Citations.] A trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial. [Citations.]" (*People v. Welch* (1999) 20 Cal.4th 701, 729.)

Defendant contends that the court erred in accepting his waiver of his right to be represented by counsel. His claim is twofold: that the court erred in finding him competent to waive his right to counsel and his waiver was not knowing and intelligent. Neither of these claims has merit.

At a pretrial hearing on May 22, 2000, before Judge Victoria Chavez, defendant was advised that his court-appointed attorney, Deputy Public Defender William Sadler, was scheduled to be in trial on another case and thus his case would be trailed. Defendant indicated that he would not waive time. The court informed defendant that appointing a new attorney at that late stage would probably result in a continuance of the trial to give the new attorney time to prepare. In response, defendant requested "to go pro per" even though he had never before represented himself in trial.

The court advised defendant against doing so and told him he would not receive any special assistance from the court. Defendant complained that Sadler had not adequately represented him thus far because he had not given him "papers" that he requested. The court asked defendant if he wanted a *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118) hearing. Defendant said that he did not because he already had one, which was denied, and he did not want a "public defender." The court gave defendant a form entitled "Petition to Proceed in Propria Persona." The form in substance explained the

risks and disadvantages of self-representation and the court rules by which a defendant representing himself must abide.

The court then permitted the prosecutor to amend the complaint to allege a five-year prior conviction enhancement based on the same prior conviction supporting a second strike allegation in the original complaint. Defendant waived reading of the amended complaint and was arraigned.

Next, the court addressed the matter of defendant's *Faretta* request. Defendant initialed and signed the petition form in which he represented that he understood he was being charged with "felony battery," that he was 49 years old and had completed one year of college but had no legal training or previous experience representing himself in court. The court found that defendant "demonstrated sufficient understanding of the charges against him and the proceedings" and that defendant was "sufficiently educated" to make the court "feel that he has a right to exercise the privilege to represent himself." The court then relieved Sadler as defendant's attorney.

Defendant moved to dismiss the case on the ground that Sadler had engaged in "misconduct" because he did not "take [him] to pretrial." Defendant indicated that pretrial hearings had to be postponed because Sadler was out of town, thus he was prevented from "see[ing] the witnesses against [him] or anything of that nature." The court explained that defendant was not entitled to see witnesses at pretrial hearings. Defendant disagreed. The court also pointed out that several minute orders showed that defendant was present at pretrial hearings at which another deputy public defender stood in for Sadler.

The case was transferred the following day, May 23, 2000, to Judge Kamins for trial. Defendant requested a continuance, complaining that he had not been given enough time to review discovery thoroughly, which consisted of a four-page police report and a criminal history packet. At that time, defendant was also provided with copies of victim Ortega's hospital records. The court denied defendant's continuance request. The court then explained to defendant the procedures for selecting a jury and his right to have a

separate trial on the prior conviction allegations. Voir dire commenced in the late morning.

Around 2:30 p.m., defendant indicated that he wanted to make a statement for the record. Defendant stated that he was housed in the jail's psychiatric unit and took "psychiatric medication" (Zoloft and Dilantin). He added, "I don't have a clue on what's going on. I'm not an attorney or anything, you know. And I feel like I'm being led to the slaughter." The court asked defendant if he wanted Sadler reinstated as his attorney. Defendant declined.

Defendant insisted that he was "not psychiatrically capable of" representing himself. He further claimed that he was supposed to take medication every morning, afternoon and evening but "by going through this trial, [he] miss[ed his] medication twice a day." The court reminded defendant that he elected to represent himself. Defendant responded, "I did not know what I was doing. I didn't know what I was doing." The court again offered to reinstate Sadler. Defendant retorted, "He does not know what he's doing either. He's trying to put me in prison. [¶] And not once did he mention anything about my defense. The first thing he mentioned was about me taking some deal for this, that, or the other thing. [¶] And he never even mentioned any defense with me. And that's, and he's supposed to be my defense attorney, you know. [¶] All the things that I requested of him, I never got."

The court assured defendant it would inquire about defendant's medication problem and excused the jury at 3:20 p.m. so that defendant could get back to jail in time for his evening dose. The court then instructed the bailiff to try to arrange for defendant's medication to be brought to court.

The following morning, defendant indicated that he was not well. He said, "I'm too sick. They didn't respond to my medicine until they got the fax. And I'm too sick. I don't feel good." The court asked defendant if he had taken his medication that morning. Defendant answered, "Yeah, but it is not doing any good. I guess the stress is over-stressing me." He also indicated that he was going to have a seizure. He told the court that he was epileptic and too sick to be in court that day. The court told defendant that it

would order the sheriff's department to take defendant to a hospital after court ended but that it intended to proceed with jury selection. The court stated for the record that defendant appeared alert the previous day and took notes during voir dire. The court then asked defendant if he was sick or epileptic. Defendant said that he was not, but that he had mental problems and was receiving federal assistance for a mental disability. He said that his mind was "blowing away," that he felt "twisted up," and then he criticized the court for not doing anything to help him.

The court told defendant that it was sorry, but that voir dire would proceed. Defendant replied, "Right now — " and fell to the floor. The court described the incident as follows. "[Defendant] had what looked like a seizure, but he announced it, pushed his chair back, and when the court was going to call the jury in, he carefully jumped out of his chair, did not fall, but jumped out, and landed in a comfortable position, and started shaking." Paramedics arrived and took defendant to the hospital.

The next morning, May 25, 2000, the court inquired of defendant's health, noting that the hospital reported that there was no evidence that defendant had suffered a seizure the previous day. The jurors were not present. Defendant went into a tirade. He accused everyone in the courtroom of conspiring to put him in prison and insisted that he needed to see a doctor. The court tried to explain to defendant that he had been found competent to waive his right to counsel and to represent himself. Defendant stuck his fingers in his ears, accusing everyone present of being "liars" and "devils." He also ranted that African-American criminal defendants were sentenced to prison as a matter of course while Caucasian criminal defendants were not. The court repeatedly warned defendant that he would be removed from the courtroom if he did not cooperate.

Whenever the court spoke, defendant stuck his fingers in his ears and raged about his perceived mistreatment by the court. At one point defendant said, "You try and smile, and you stab me in my back real quick." When the court indicated for the record that defendant had recently proposed to the prosecutor a counteroffer of five years probation, defendant said, "Fifteen years. You know, that's like a joke to you guys."

The court removed defendant from the courtroom but allowed him to return after a few minutes. Defendant continued his disruptive behavior. The court stated, "It appears that the defendant is consciously trying to cause his own absence from the courtroom by now putting his fingers in his ears, and he's loudly humming. [¶] To the court, this is all a means to delay the trial, as yesterday there was an alleged seizure that was obviously faked."

The court again removed defendant from the courtroom and called in the jurors. Defendant was yelling from the lockup. The court told the jurors that defendant had "chosen not to be present" and admonished them not to feel sympathy or prejudice toward defendant as a result of the situation. The jurors assured the court that they would not let the situation influence them in any way.

The accompanying minute order indicated that the court continued with voir dire for an unspecified period of time, excused the jurors, and brought defendant back into the courtroom and asked him if he wanted to excuse any prospective jurors. Defendant's response is not indicated in the record. Thereafter, voir dire continued and was concluded by 2:35 p.m.

After the jury was impaneled, both the prosecutor and defendant gave opening statements. In his opening statement, defendant reported that he earned a living by selling necklaces on the street, that Ortega asked to look at one his necklaces, that after doing so Ortega claimed that it was "'fake,'" and that Ortega toyed with him by not giving back the necklace when requested. Defendant continued, admitting that he became angry and grabbed the necklace out of Ortega's hand. As he did so, Ortega kicked him, causing them both to fall to the ground. Defendant then claimed that he got up and ran away. He denied hitting Ortega. He concluded by briefly reporting the details of his arrest shortly after the incident and Ortega's subsequent identification.

The prosecutor called two witnesses, Ortega and one of the arresting police officers. Defendant conducted cross-examination of both witnesses. At times, defendant expressed frustration because the court sustained most of the prosecutor's objections to defendant's attempts to impeach Ortega with a police report.

Defendant offered no evidence in defense apart from further questioning Ortega. Defendant gave a closing argument in which he pointed out that although Ortega had testified that he was with a coworker at the time of the attack and that police officers subsequently took photographs of his injuries, the prosecutor had failed to produce the coworker or the photographs. Defendant also pointed out inconsistencies in Ortega's testimony. On May 26, 2000, the jury found defendant guilty after deliberating for approximately one hour.

The trial on the prior conviction allegations was held on May 30, 2000. Defendant informed the court that he had contacted an attorney and, on the advice of this attorney, defendant wanted to state for the record that a federal administrative proceeding had found him to be disabled as of January 1996, that he "must and should have had representation from competent defense counsel[,]" that he was requesting a continuance "for as long as possible," and that he wanted to file an appeal. The court proceeded with the trial on the prior conviction allegations and rendered a true finding. The court set sentencing for June 30, 2000.

In a letter dated June 7, 2000, defendant asked the court to appoint him a "state attorney." He claimed that he was not capable of representing himself due to his mental disabilities and his lack of legal education or experience. On June 30, 2000, defendant informed the court that he had retained an attorney and requested a continuance of the sentencing hearing. The court granted defendant's request.

On July 27, 2000, defendant's retained counsel, Huey Shepard, formally substituted in as counsel. Sentencing was continued to August 30, 2000. At sentencing, defendant moved for a new trial on the ground that he was mentally disabled and therefore lacked the capacity to represent himself at trial. Defendant's motion was supported by evidence that he qualified for federal disability payments due to a history of substance abuse and mental impairments, namely "schizoaffective disorder" and post-traumatic distress disorder following a 1995 gunshot wound to his abdomen. Defense counsel further asserted that in his experience with defendant, there were "times when it [was] very difficult to fully communicate with [defendant] about his present status in

relation to this case." Defendant also reported to Shepard that he was "delusional" and not thinking coherently.

a. Competence to waive counsel

Defendant contends that the court erred in granting his *Faretta* request because he was not competent to waive his right to counsel. We disagree.

"The standard for competency to waive the constitutional right to the assistance of counsel has been equated with that for competency to stand trial: whether the defendant has a '"sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,"' and has '"a rational as well as factual understanding of the proceedings against him."' [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1364, citing *Godinez v. Moran* (1993) 509 U.S. 389, 396, 397–402.)

"'"The determination of the trial judge as to the defendant's competence to waive counsel involves an exercise of discretion by the trial judge which in the absence of an abuse of discretion will not be disturbed on appeal."' [Citations.]" (*People v. Teron* (1979) 23 Cal.3d 103, 114, disapproved on another ground in *People v. Chadd* (1981) 28 Cal.3d 739, 750, fn. 7.)

Defendant argues that the court erred in determining, "without the advice of a psychologist or psychiatrist," that defendant was competent to waive his right to counsel. We disagree. A trial court is not required to make a competency determination every time a defendant makes a *Faretta* request. "As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence." (*Godinez v. Moran, supra*, 509 U.S. at p. 401, fn. 13.)

At the time Judge Chavez granted defendant's request to represent himself, there was no evidence to support a doubt as to defendant's competence to waive his right to counsel. We disagree with defendant that his exchange with Judge Chavez, particularly defendant's claim that he had not been present at pretrial, should have prompted the judge to inquire into his competency to waive his right to counsel. Rather, defendant erroneously believed that witnesses testify at pretrial hearings. Because defendant had not attended any pretrial hearings at which this had occurred, he likely concluded that he

had been precluded from at least some pretrial hearings. The foregoing demonstrates only that defendant lacked legal education and experience, not that he was incompetent to waive his right to counsel. "*Godinez* 'explicitly forbids any attempt to measure a defendant's competency to waive the right to counsel by evaluating his ability to represent himself.' [Citation.]" (*People v. Welch*, *supra*, 20 Cal.4th at p. 734.)

Defendant points to the incidents that occurred after the court granted his *Faretta* request, arguing that such evidence showed that he was not competent to waive his right to counsel. We are not persuaded.

Several appellate courts have suggested that a court may have a sua sponte duty to reconsider a defendant's propria persona status when faced with substantial evidence of incompetence. (*People v. Poplawski* (1994) 25 Cal.App.4th 881, 890–891, and cases cited therein.) "'Substantial evidence' has been defined as evidence that raises a reasonable doubt concerning the defendant's competence to stand trial. [Citations.] In *People v. Pennington* [(1967)] 66 Cal.2d [508,] 519, [the Supreme Court] enunciated the following standards regarding what would constitute substantial evidence of incompetence to stand trial: 'If a psychiatrist or qualified psychologist [citation], who has had sufficient opportunity to examine the accused, states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel, the substantial-evidence test is satisfied.'" (*People v. Welch*, *supra*, 20 Cal.4th at p. 738.) Even considering also the evidence of defendant's post-conviction mental health treatment, there was no substantial evidence of incompetence.

"'When the evidence casting doubt on an accused's present sanity is less than substantial . . . only where a doubt as to sanity may be said to appear as a matter of law or where there is an abuse of discretion may the trial judge's determination be disturbed on appeal.' [Citations.]" (*People v. Welch*, *supra*, 20 Cal.4th at p. 740.) Nothing in the record indicates that the court had declared a doubt as to defendant's competence to stand

trial or to waive his right to counsel. Thus, we cannot say that a doubt as to defendant's competence appeared as a matter of law. (*Id*. at pp. 740–742.)

"When the trial court's declaration of a doubt is discretionary, it is clear that 'more is required to raise a doubt than mere bizarre actions [citation] or bizarre statements [citation] or statements of defense counsel that defendant is incapable of cooperating in his defense [citation] or psychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense [citation].' [Citation.]" (*People v. Welch*, *supra*, 20 Cal.4th at p. 742.)

On the day after defendant's "seizure," which the trial court deemed faked, and on the *same* day that defendant engaged in such a disruptive tirade that required his momentary removal from the courtroom, defendant nevertheless fully participated in trial. Defendant explained to the jury in his opening statement his version of the facts and cross-examined the prosecution's only two witnesses. Defendant even made an effort to introduce evidence to impeach the victim's testimony. In his argument to the jury on the following day, defendant highlighted gaps in the prosecution's case and pointed out inconsistencies in Ortega's testimony. Later, after defendant had retained counsel, his attorney argued that the court should not have permitted defendant to represent himself. Counsel pointed to defendant's lack of legal experience, his mental disability, and his communication difficulties, but stopped short of declaring that defendant was unable to consult with him or assist in his defense. As noted, whether defendant had the ability to represent himself had no bearing on whether he was competent to waive his right to counsel. (*People v. Welch*, *supra*, 20 Cal.4th at p. 734.)

The record before us clearly establishes that, notwithstanding defendant's disruptive behavior, his medication needs, and his mental disabilities, defendant rationally and factually understood the nature of the proceedings and was able to

participate meaningfully in his defense. The trial court did not abuse its discretion in failing to declare a doubt as to defendant's competency to waive his right to counsel.[1]

b. Knowing and voluntary waiver

In a supplemental brief, defendant contends that his waiver of his right to counsel was invalid because he was not advised of the maximum sentence that could be imposed should he lose at trial. We disagree.

"A defendant seeking self-representation 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."' [Citation.] The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case. [Citations.]" (*People v. Bloom* (1989) 48 Cal.3d 1194, 1224–1225.)

Cases have *suggested* that a defendant requesting to represent himself should be told of the possible punishment he would be exposed to should he lose at trial. (See *People v. Noriega* (1997) 59 Cal.App.4th 311, 319; *People v. Lopez* (1977) 71 Cal.App.3d 568, 573.) Assuming, without deciding, that the court's advisement in this case was deficient because of the absence of information regarding defendant's potential sentence, the error was harmless beyond a reasonable doubt.

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[1] Citing *Moran v. Godinez* (9th Cir. 1994) 57 F.3d 690, defendant suggests that the trial court was required to hold a competency hearing upon learning that defendant was taking "psychotropic medication." That case is clearly distinguishable. There, at a hearing in the Nevada state trial court, the defendant fired his attorneys, pleaded guilty to three capital crimes, stated he would offer no mitigating evidence at sentencing, and indicated that he was under the influence of medications. In addition, the trial court was aware that the defendant had attempted suicide three months earlier and upon his recuperation had confessed to the murders that supported the capital charges. (*Id*. at pp. 694–695.) The Ninth Circuit concluded that "[i]n these circumstances, the state trial court should have entertained a *bona fide* doubt as to [the defendant's] competence. The court should have held an immediate competency hearing." (*Id*. at p. 695.)

The information stated that the maximum prison term for felony battery was four years and it was amended to include a five-year prior serious felony conviction allegation before defendant was granted propria persona status. Defendant was present at the time of the amendment. Thus, by the time defendant had waived his right to be represented by counsel, he should have expected at least a potential maximum sentence of nine years. And defendant mentioned a 15-year sentence when the court mentioned defendant's plea bargain offer of five years probation.

In this case, the actual maximum term defendant faced was 13 years. But nothing in the record suggests that defendant would have changed his mind about representing himself if he had been advised of this discrepancy. Rather, the record clearly demonstrates that defendant was adamantly opposed to being represented by Sadler or any attorney from the public defender's office. The error was harmless beyond a reasonable doubt. (*People v. Wilder* (1995) 35 Cal.App.4th 489, 502–503.)

c. Petition for writ of error *coram vobis*

In his petition for writ of error *coram vobis*, defendant submitted evidence relating to psychiatric care that he received while imprisoned on the instant case. The evidence indicates that from September 2000 to August 2001, defendant was taking several types of medication in conjunction with his mental health treatment. Defendant reported that he suffered head trauma in 1995 and thereafter complained of seizures. He also reported hallucinations, both auditory and visual. Defendant's September 11, 2000 interview with one of the mental health workers indicated that defendant "ha[d] a possible thought disorder" and that he was "experiencing a major depression."

"'The writ of *coram vobis* is essentially identical to the writ of *coram nobis* except that the latter is addressed to the court in which the petitioner was convicted. [Citation.] These writs will be granted only if petitioner can "show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the judgment." [Citations.]' [Citation.]" (*People v. Welch* (1964) 61 Cal.2d 786, 790.) We have reviewed the evidence contained in defendant's petition for writ of error *coram vobis* and conclude that

it is insufficient to raise a reasonable doubt that defendant was not competent to waive his right to counsel at the time of trial. (*People v. Welch*, *supra*, 20 Cal.4th at p. 738.)

2. Sufficiency of the evidence

Defendant contends that there was no substantial evidence that he inflicted serious bodily injury on the victim. We disagree.

Defendant was convicted of battery with the infliction of serious bodily injury. (Pen. Code, §§ 242/243, subd. (d).) The term "serious bodily injury" as it pertains to felonious battery "means a serious impairment of physical condition, including, but not limited to, the following: . . . bone fracture; . . . ." (Pen. Code, § 243, subd. (f)(4).)

Defendant's punch caused Ortega's nose to bleed profusely and he required medical treatment to stop the bleeding. The slightest touch to the area around Ortega's nose and left eye severely pained him. Bruising to the area took about a week to diminish. In addition, the hospital records indicated that Ortega suffered a "nasal fracture." The foregoing reasonably supported an inference that defendant inflicted serious bodily injury on Ortega.

DISPOSITION

The judgment is affirmed. The petition for writ of error *coram vobis* is denied.

NOT TO BE PUBLISHED.

MALLANO, J.

I concur:

SPENCER, P. J.

I concur in the judgment only.

VOGEL (MIRIAM A.), J.